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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

U.S. BANCORP EQUIPMENT FINANCE
INC,

Plaintiff and Appellant,

v.

J. SCOTT McFETTERS et al.,

Defendants and Respondents.

G041929
(Consol. with G042094)

(Super. Ct. No. 30-2009-00117219)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Gregory H. Lewis, Judge. Reversed in part and remanded with directions.

Orrick, Herrington & Sutcliffe, Timothy J. Long, Stacy E. Don and Michael D. Weil, for Plaintiff and Appellant.

Law Offices of M. Christine Brady and M. Christine Brady; Benedon & Serlin, Douglas G. Benedon and Kelly R. Horowitz, for Defendants and Respondents.

U.S. Bancorp Equipment Finance, Inc. (USBEP) appeals from an order which granted a motion to strike nine of the ten causes of action listed in its complaint against J. Scott McFetters, James McShane and CoreTech Leasing, Inc., (CoreTech), on the ground they constituted a “strategic action against public participation” or “SLAPP” action. (Code Civ. Proc., § 425.16.)¹ The court refused to strike only USBEP’s cause of action for unfair competition in violation of Business and Professions Code section 17200, which has prompted a cross-appeal by McFetters, McShane and CoreTech, arguing the court should have struck that cause of action as well.

USBEP argues the court erred in striking any of its causes of action because none arose from defendants’ acts in furtherance of their rights of petition or free speech, and because it demonstrated a likelihood of success on the merits of each claim. We conclude the trial court ruled correctly with respect to application of the anti-SLAPP law.

Although USBEP purported to state 10 distinct causes of action, its aggressively-inclusive pleading style – in which it first alleged all the relevant facts, incorporated those facts into the first cause of action, then successively incorporated all the facts and all the paragraphs into each successive cause of action, and ultimately prayed for broad relief based upon the entirety of its claims – requires that we combine the allegations accordingly for purposes of determining the applicability of the anti-SLAPP law. To the extent that each “cause of action” includes the others, we cannot analyze it independent of those others.

Thus, only the petition’s first cause of action, which alleges misappropriation of trade secrets under the California Uniform Trade Secrets Act, Civil Code section 3426, et seq. (CUTSA), can be assessed independently for purposes of determining whether the anti-SLAPP law is applicable. And it clearly is, since the cause of action specifically alleges that both McFetters’ and McShane’s inclusion of an alleged

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

trade-secret document in a litigation filing against USBEF as an “example” of their alleged misconduct. That is petitioning activity. And that alleged petitioning misconduct is then incorporated into each successive cause of action identified in the complaint. Indeed, the complaint actually alleges no other specific use or disclosure of trade secret documents or information, nor any specific facts suggesting that McFetters or McShane *acquired* the disputed information wrongfully. In these circumstances, the allegations of protected petitioning activity cannot be construed as merely “incidental” to the causes of action alleged.

With regard to whether USBEF demonstrated the potential merit of its causes of action, we agree almost entirely with the trial court. USBEF failed to produce sufficient evidence to demonstrate a probability of prevailing on its causes of action for misappropriation of trade secrets (based either on CUTSA or a theoretically distinct “common law” cause of action), breach of the duty of loyalty; breach of fiduciary duty; commission of computer crimes; breach of contract; conversion; interference with prospective economic relations or civil conspiracy. Simply put, USBEF offered no evidence that any defendant had wrongfully obtained the alleged trade secret information at issue herein, nor any evidence they used or disclosed such information other than as part of the specific litigation filings alleged in the complaint. Specifically, there was no evidence that the alleged trade secrets had actually been used in competition with USBEF; that any defendant had threatened to use such information to compete; or that USBEF had been injured or lost business as a result of any alleged misappropriation. Nor was there any evidence that USBEF had been harmed by either McFetters’ alleged computer crimes, McShane’s alleged “sabotage” of its business development plans during a trade show, or either’s alleged breach of his employment agreement. Such conduct by an employee might certainly warrant discipline, or even termination of employment, but in the absence of evidence linking any of the conduct to some specific

loss of business or other compensable harm, it will not support a cause of action. And no such evidence was produced by USBEF.

On the other hand, as the court apparently recognized, a cause of action under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) does not require any showing the plaintiff has suffered damage as a result of the acts constituting the unfair competition. Indeed, damages are not recoverable under the law. A cause of action based upon the unfair competition law requires only that defendants have committed some “unlawful, unfair or fraudulent business act or practice,” and it empowers the court to enter “such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.” Here, USBEF introduced evidence sufficient to establish that both McFetters and McShane unlawfully retained confidential customer information in violation of their agreements with USBEF when they terminated their employment. Such unlawful conduct, which can be fairly construed as a “business act” under the broad expanse of the unfair competition law, was sufficient to invoke its protections and empower the court to issue an injunction to “restore” (to the extent possible) the customer information to USBEF. We differ with the trial court’s analysis only to the extent that it apparently concluded USBEF’s evidence was sufficient to extend its unfair competition cause of action to CoreTech. There was no evidence to support the allegation that CoreTech itself was involved in any unlawful acts, and thus we conclude the court should have granted its motion to strike that remaining cause of action against it.

USBEF also appeals from the court’s order granting attorney fees in favor of defendants. However, as we find no error in that decision, we affirm it.

I

USBEF's complaint alleges that it is in the business of providing "financing and leasing for capital equipment acquisitions and related project costs, such as consulting, integration and training." USBEF's sales representatives "facilitate and secure signed lease schedules with customers [and are] the customer's primary contact person within USBEF." McFetters is alleged to have been USBEF's "Vice President of Legal Services, and [to have] led a group of USBEF's sales representatives, including McShane, who assisted him in tracking deals and maintaining USBEF's relationships with customers."

The complaint alleges that McFetters left the company in March of 2008, and formed CoreTech, a "new competing leasing business," in April of 2008. However, before McFetters left USBEF, he was allegedly "not working in the best interest of USBEF by, among other things, misappropriating [it's] trade secrets and usurping its business opportunities" The complaint then alleges that an "example" of this misconduct is McFetters' attachment of a copy of a USBEF "Gold Sheet" to a court filing in December of 2008. This "Gold Sheet" is described as "an internal USBEF document that contains a summary of a remarketing lease transaction." The summary allegedly "includes a customer's past lease information, including the term of the lease, description of equipment, lease end date, rent, payoff amount, costs, expenses and margins." USBEF sales agents allegedly "use the Gold Sheets to negotiate new or renewed leases."

McFetters allegedly "did not have permission" to have the information on the Gold Sheet, but the complaint does not specifically allege how he obtained either the sheet or the information. Instead, the complaint alleges that McFetters "knew or should have known" he "had acquired such [trade secret] information under circumstances giving rise to a duty to maintain its secrecy or limit its use," and that he obtained the

information “from persons [he] knew or reasonably should have known owed a duty to USBEF to maintain [its] secrecy or acquired the information through improper means.”

The complaint also alleges “[e]vidence confirms” that on March 25, 2008, one day after he terminated his employment with USBEF, McFetters “connected the hard drive from his USBEF laptop” to another computer “in order to transfer USBEF trade secrets and confidential information to use with his new business,” which was unauthorized by anyone at USBEF. But the complaint does not specifically allege that he actually did transfer any trade secrets and confidential information.² Nor does it allege he actually *used* any of this alleged trade secret information in his new business.

McShane is likewise alleged to have been “not working in the best interest of USBEF,” and to have “misappropriated its trade secrets, usurped its business opportunities and attempted to sabotage [its] business and sales opportunities” before he left the company on May 1, 2008. He is alleged to have made his “unlawful motives known” in an email on April 6, 2008 (approximately 3 weeks before he left), when he wrote to McFetters that he “can’t wait to bury these fools . . . I will quit [when I return from vacation] and it’s off to the races.”³

Again, the alleged “example” of McShane’s unlawful conduct is his use of trade secret information in support of a litigation filing; i.e., that on December 5, 2008, he filed a claim with the Department of Industrial Relations to which he attached a

² In fact, the specific evidence submitted by USBEF on this point in support of its request for a temporary restraining order was the declaration of a forensic computer analyst. Although the analyst was of the “opinion that McFetters connected the hard drive of his USBEF computer . . . in order to transfer electronic files,” he candidly conceded he “was not able to recover any affirmative forensic evidence showing that such a transfer actually took place.” Given the admitted lack of evidence that any transfer occurred, the basis for the analyst’s “opinion” regarding McFetters’ purpose is unclear.

³ Of course, while this email clearly reflects that McShane had become disenchanted with USBEF prior to his actual departure from the company, that seems an unremarkable revelation. Employees do not generally leave their employment in the first moment they become dissatisfied with their situation. What’s more significant is that the email technically does not reflect any *current* effort to undermine the company. Instead, McShane is expressing his intention to “bury the fools” in the future, after he returns from vacation and quits. In fact, earlier portions of the email in which McShane expresses this intention – portions which reflect McShane to be immature, angry, homophobic, and otherwise thoroughly dislikable by almost any standard – are far more disturbing, although irrelevant to the issues before us. USBEF’s counsel is to be commended for not attempting to highlight this other aspect of the email in an effort to prejudice the court against McShane. It must have been tempting.

document allegedly containing “USB EF trade secret customer leasing information” which McShane “did not have USB EF’s permission to possess.”

Like McFetters, McShane is not specifically alleged to have stolen any information. The closest the complaint comes to alleging such conduct is when McShane is alleged to have “unlawfully accessed, downloaded and or emailed to himself trade secret, confidential and proprietary information belonging to USB EF” in the “days and months prior to his resignation.” But despite the conclusory assertion that McShane acted “unlawfully,” the specific allegation doesn’t really suggest misconduct. According to USB EF’s own allegations, McShane, as a salesman for USB EF, would have been *expected* to utilize the trade secret information USB EF describes in its complaint during the time he remained employed.

In particular, McShane is alleged to have emailed a document referred to as the “yeah.xls” spreadsheet to his personal email account on April 1, 2008, while still employed by USB EF. According to the complaint, the spreadsheet included “detailed customer leasing information, such as lease deal size, gross margins, projected commissions, debt rates, term of lease, lease closing date, and lease property installation periods.” Allegedly this information “would allow CoreTech or any new leasing company to easily gain inside information about USB EF’s customers, the amounts they were charged for their leases, the margins that USB EF expected, the equipment needs of USB EF customers, and their contact information.” The information is allegedly not “generally known” to either the public or persons who can derive economic benefit from its use, and USB EF has allegedly taken “reasonable steps to protect [its] secrecy.”

As with McFetters, the complaint does not specifically allege facts demonstrating that McShane acted improperly in acquiring the trade secret information. Instead, it alleges McShane also “obtained the above-described information from persons [he] knew or reasonably should have known owed a duty to USB EF to maintain [it] in secrecy or acquired the information through improper means.” And, as with McFetters,

the complaint does not allege McShane actually used any of the trade secret information to compete with USBEF. Instead, the only specific allegation of use or disclosure of the trade secret information is that each defendant relied upon it as part of the litigation concerning his claims for past due commissions.

McShane, in conspiracy with McFetters, is also alleged to have “sabotaged” USBEF by intentionally failing to invite clients to a dinner arranged by USBEF during an important trade show, which caused USBEF “significant lost opportunities and damages.”

Finally, both McFetters and McShane are alleged to have signed agreements which provided that all confidential and trade secret information to which they had access during their employment is the property of USBEF, and required them to return all such information to USBEF in the event their employment terminated. McShane is alleged, in addition, to have signed a contract by which he agreed “to not solicit, take away, divert or attempt to solicit any existing or prospective customer, vendor or lender, or business from USBEF.”

Based largely upon these facts, USBEF’s complaint purported to state causes of action for (1) violation of CUTSA; (2) “common law misappropriation and unfair competition”; (3) “breach of the duty of loyalty”; (4) “breach of fiduciary duty”; (5) “commission of computer crimes”; (6) “breach of contract”; (7) unfair and unlawful competition in violation of Business and Professions Code section 17200; (8) “conversion”; (9) “intentional interference with prospective economic relations”; and (10) “civil conspiracy.”

McFetters and McShane moved to strike each of the causes of action alleged in the complaint on the ground that it qualified as a SLAPP action, and lacked potential merit. In support of their motion, they argued that the CUTSA cause of action, as well as each of the successive causes of action, was based, at least in part, on McFetters’ and McShane’s alleged acts of using USBEF’s trade secret information in

support of his commission litigation against it – conduct which qualified as an “act in furtherance of [his] . . . right to petition.”

In support of the motion to strike, McFetters filed a declaration in which he explained that during his employment with USBEF, Gold Sheets were routinely distributed to USBEF salespeople as a means of tracking their entitlement to commissions, and to his knowledge, no employee had ever been asked to return one. He acknowledged he had attached a Gold Sheet to a litigation filing relating to disputed commissions (as alleged in the complaint), but explained he had been given that sheet for the purpose of supporting his commission claim. McFetters asserted the Gold Sheet actually contained little significant customer information, and did not even include specific equipment information. By contrast, he asserted that the compensation reports given to him by USBEF’s attorney after he had departed his employment, contained significantly more customer-related information, including customer identities, hardware and software costs, lease terms, margins, etc.⁴ McFetters also asserted that a fairly comprehensive list of USBEF’s customers could be compiled by simply searching the Lexis/Nexis database for recorded UCC security interests involving USBEF, and attached such a list to his declaration. According to McFetters, USBEF uses this technique to “obtain this same information about other leasing companies’ clients.”

McFetters also explained he had been given a laptop by the company as part of his employment, and because he traveled extensively as part of his work, it was understood he would use it for both work and personal use. He was given no restrictions on its use. Consequently, the laptop included information of a personal nature, including

⁴ We cannot assess the relative significance of the information contained on the Gold Sheet or McShane’s “yeah.xls” spreadsheet, because the trial court ordered those documents sealed, and the parties did not include them in the record on appeal. Consequently, for purposes of this appeal we will assume, without deciding, that the evidence was sufficient to support a prima facie determination, that those documents did include some confidential or trade secret information. The issue appears to be fraught with factual disputes, and an ultimate determination of the point is neither necessary nor appropriate in the context of this appeal.

his personal banking and “Indian Princesses.”⁵ Thus, when he left his employment at USBEF, McFetters paid a “professional computer company” to delete everything off of the computer before returning it to the company. He expressly denied using any USBEF confidential information to compete with it.

McShane also filed a declaration, in which he explained, among other things, that the “yeah.xls” spreadsheet was simply a document he had created and maintained during his employment to keep track of his commission earnings. His supervisors at USBEF were at all times aware he maintained such a document, and no one ever told him he should not do so. McShane explained that after he terminated his employment with USBEF, he was forced to bring an action before the California Labor Board to recover outstanding commissions owed to him when he left its employ. He stated that he gave a copy of the spreadsheet to both “[the] Labor Board and USBEF’s counsel to support my commission claim.”

McShane also explained that he had frequently worked from home during his tenure with USBEF, as did many other employees. Consequently, he often emailed work-related documents to his home computer, or carried copies with him. He was never told these documents, including “Gold Sheets, Green Sheets, Lease Proposals or [the] Yeah document” were confidential or constituted trade secrets. He was allowed to transfer them freely in and out of the USBEF workplace. Like McFetters, McShane expressly denied ever taking any documents to unfairly compete with USBEF, and denied using any documents to compete with it. He also denied ever having responsibility for arranging clients’ attendance at a USBEF dinner during a trade show, as alleged in the complaint.

In opposition to the motion to strike, USBEF argued that none of the causes of action alleged arose out of defendants’ speech or petition activity, and asserted that

⁵ “Indian Princesses” is not explained, but we presume it refers to McFetters’ involvement, in his capacity as a parent or adult group leader, in the youth organization.

even if some or all of the causes of action were construed as arising out of such activity, the motion should be denied in any event, because it had produced evidence demonstrating a probability of success on the merits of each claim.

The court granted the motion to strike nine of the ten causes of action alleged by USBEF. The court noted that the complaint expressly characterized McFetters' and McShane's utilization of the Gold Sheet and the "yeah.xls" as part of filings in their respective commission litigation as "example[s]" of their alleged misconduct, thus making clear that claims arose, at least in part, from those acts. Although the court agreed there was sufficient evidence to demonstrate that the Gold Sheet and the "yeah.xls" spreadsheet contained trade secret information, and that McFetters and McShane possessed them "without plaintiff's permission," it nonetheless determined USBEF had failed to demonstrate a probability of prevailing on most of its cause of action.

Among other problems, the court pointed out that USBEF had failed to produce evidence of damages caused by defendants' alleged breaches of the obligations outlined in the complaint, and had thus failed to demonstrate a probability of prevailing on any of the claims alleged, other than the claim based upon the statutory unfair competition law. The court consequently denied the motion to strike as to that one cause of action.

The court also determined that defendants were the prevailing parties on the anti-SLAPP motion, and granted their fee request in the amount of \$38,777.78.

II

Our review of an order granting a motion to strike a complaint as a SLAPP suit is de novo. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999, ["Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal."]); *Bernardo v. Planned*

Parenthood Federation of America (2004) 115 Cal.App.4th 322, 339; *Jespersen v. Zubiarte-Beauchamp* (2003) 114 Cal.App.4th 624, 629.)

Subdivision (b)(1) of section 425.16 requires a two-step process for determining whether a defendant's motion to strike should be granted. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Then, if the court finds that such a showing has been made, the burden shifts to plaintiff to demonstrate "there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568.)

However, before we address the merits of the motion to strike, we must address two other issues. First, USBEF's persistent contention that application of the anti-SLAPP law to this case would "immunize" McFetters' and McShane's alleged misappropriation of trade secrets, and "effectively eviscerate the trade secret laws"⁶ is simply incorrect. We hate to characterize this as a common misperception about the anti-SLAPP law, but must note it's at least a fairly common *assertion* made by plaintiffs who find themselves on the losing end of its protections. So we must be clear: the anti-SLAPP does not immunize any conduct, or absolve anyone from liability to which they would otherwise be subject in the absence of the anti-SLAPP law.

A motion to strike under the anti-SLAPP law is merely a *mechanism to test the merits* of certain claims at an early stage of the litigation, nothing more. If a cause of

⁶ At other points in its brief, USBEF claims that the anti-SLAPP law would allow McFetters and McShane to "escape liability" and result in their being "absolved" of their misdeeds.

action which is subject to the anti-SLAPP law is shown to have potential merit – i.e., plaintiff demonstrates evidence sufficient to support a prima facie case against the defendant – the motion will be denied and the cause of action will progress. In this case, as with every other successful anti-SLAPP motion, USBEF’s causes of action were stricken not merely because the court determined they were based upon conduct which is protected by the anti-SLAPP law, but because the court further determined that USBEF *failed to demonstrate those causes of action had potential merit*. Such a ruling, if correct, benefits both defendants and the plaintiff, who will presumably save a great deal of time and energy it would have otherwise devoted to pursuing a claim which was destined to fail in any case.

Second, USBEF claims it is notable that McFetters and McShane did not appeal the court’s order granting it a preliminary injunction. We agree, but it’s notable only because that means we need not concern ourselves with whether the court ruled correctly with respect to that issue. The only question in this appeal is whether the court ruled correctly with respect to the motion to strike, and USBEF cites no authority suggesting the court was required to make that ruling conform to whatever ruling it made in connection with a request for preliminary injunction.

Indeed, as this court has previously determined, a trial court’s issuance of a preliminary injunction is not entitled to preclusive effect in a later motion to strike under the anti-SLAPP law, as the analysis of the two issues are distinct. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832; see also *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty U.S.A., Inc.* (2005) 129 Cal.App.4th 1228.) A preliminary injunction is a mechanism designed primarily to maintain the status quo during litigation, and is not the equivalent of an adjudication of the merits. (*Baypoint Mortgage Corp. v. Crest Premium Real Estate Etc. Trust* (1985) 168 Cal.App.3d 818, 823-824 [grant of a preliminary injunction “does not determine any of the merits of the controversy.”].)

III

Turning to the merits of the anti-SLAPP ruling, we start with the issue of whether any or all of USBEF's causes of action arise out of "act[s] in furtherance of a person's right of petition or free speech," which the anti-SLAPP law specifically defines as including "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

In this case, McFetters and McShane argued below that USBEF's cause of action for misappropriation of trade secrets – and each of the successive causes of action which were based largely upon that alleged misappropriation – arose out of their use of alleged trade secret documents in support of their positions in other litigation against USBEF. Such conduct clearly qualifies as a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," and thus triggers the application of the anti-SLAPP law. The trial court agreed, and so do we.

"In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) Moreover, we must keep in mind that "the anti-SLAPP statute should be broadly construed and a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action

as a garden variety tort claim when in fact the liability claim is predicated on protected speech or conduct. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90-92.)

Moreover, “a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one ‘cause of action.’” (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.) And “where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is ‘merely incidental’ to the unprotected conduct [citations]” (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103; see also *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty U.S.A., Inc.*, *supra*, 129 Cal.App.4th at p. 1245.)

In this case, as the trial court explained, USBEF’s complaint explicitly characterized both McFetters’ and McShane’s use of an alleged trade secret document, in support of their unrelated commission litigation against USBEF, as an “example” of their misconduct. Moreover, CUTSA, the law which governs USBEF’s first cause of action, defines “misappropriation” as not only the wrongful *acquisition* of a trade secret, but also the wrongful “[d]isclosure or use of a trade secret of another without express or implied consent.” (Civ. Code, § 3426.1, subd. (b)(2).) Thus, under the terms of CUTSA, McFetters’ and McShane’s alleged disclosures and use of the trade secret documents in their litigation would themselves qualify as distinct violations of CUTSA. Under those circumstances, we could not characterize those allegations as merely “incidental” to the CUTSA cause of action.

These misappropriation allegations are then explicitly incorporated by reference into each of the successive causes of action alleged by USBEF. And while USBEF asserts that not all of those causes of action were based upon the alleged misappropriation, what it really means is that not all of them were based *entirely* on those allegations. That is not the test, because, as explained above, a “mixed” cause of action,

which relies upon both protected and unprotected conduct, will still fall within the protections of the anti-SLAPP law.

Thus, for example, USBEF's attempt to characterize its causes of action for breach of the duty or loyalty and breach of fiduciary duty as arising out of defendants acts of "sabotaging USBEF's plans to foster and create new client relationships at a trade show, usurping USBEF's business opportunities on CoreTech's behalf, failing to work in USBEF's best interest as USBEF employees and working for the benefit of CoreTech while still employed by USBEF," does not mean we can ignore the fact that, as alleged by USBEF, it *also* arises out of defendant's alleged acts of misappropriation, including their reliance on trade secret information in support of their respective commissions claims.

The same can be said of the causes of action for breach of contract, conversion, interference with prospective economic relations and violation of the unfair competition law. While each of these causes of action might be based in part on facts other than defendant's alleged petitioning activity, each incorporates that alleged activity into the cause of action and relies upon it as support for the cause of action.⁷

Even the cause of action for "computer crimes" which, at first blush, would seem to represent an entirely distinct category of wrongdoing from the alleged acts of petitioning which bring this case within the anti-SLAPP law cannot be construed that way when examined closely. That cause of action explicitly alleges that one of the ways in which defendants have violated Penal Code section 502(c)'s prohibition against "computer crimes" was by "[k]nowingly access[ing] and without permission tak[ing], cop[y]ing, or mak[ing] use of any data from a computer, computer system or computer

⁷ USBEF's causes of action for "common law misappropriation" and "civil conspiracy" need not be separately addressed. CUTSA preempts any distinct claim for misappropriation of trade secret based upon "common law," (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 962) and there is no distinct cause of action for "civil conspiracy." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) In any event, both of those purported causes of action is based in part on the alleged petitioning activity.

network” That alleged category of wrongdoing is directly supported by the factual allegation that defendants used USBEF’s trade secret information (which they had also allegedly copied from its computers) in support of their commission litigation. Thus, we could not conclude that the allegations of petitioning activity were incidental to that cause of action either.

The fact that USBEF might have been able to tailor certain of its causes of action more narrowly, and thereby successfully plead them without any reference to the protected petitioning activity which brings this case within the protections of the anti-SLAPP law does not mean we will pretend that it has done so. It was USBEF’s decision to incorporate all of its factual allegations into each of its causes of action, and it must accept the consequences of having done so.

USBEF also contends the anti-SLAPP law is inapplicable to this case, because speech or petitioning activity that is illegal as a matter of law is not constitutionally protected.” (Citing *Flatley v. Mauro* (2006) 39 Cal.4th 299.) But the only speech or petitioning activity alleged is the incorporation of documents containing trade secrets into litigation filings. Such conduct could hardly be characterized as illegal *as a matter of law*. And moreover there are numerous disputes of fact in this case which might ultimately result in a determination that the conduct was not even improper. Thus, *Flatley* is inapplicable. The trial court did not err in concluding that all of its causes of action fell within the scope of the anti-SLAPP law.

IV

USBEF next argues that even if its claims were subject to the anti-SLAPP law, the court nonetheless erred in granting the motion to strike, because it produced sufficient evidence to demonstrate a probability of succeeding on the merits of each claim. Again, we are not persuaded.

We begin with an acknowledgment that USBEF introduced sufficient evidence to sustain a *prima facie* determination that some of the information in the

possession of McFetters and McShane qualified as its trade secrets and/or as confidential customer information pursuant to its employment agreements with McFetters and McShane.

Indeed, several cases have held that a compilation of information about customers, including detailed information about needs, preferences, etc., may constitute a trade secret and is distinguishable from a bare list of publicly-known customers. (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528; *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1521 [Plaintiff's customer list was "a compilation, developed over a period of years, of names, addresses, and contact persons, containing pricing information and knowledge about particular roofs and roofing needs of customers using its services: as such, it has independent economic value. The identity of those particular commercial buildings using such services is not generally known to the roofing industry."].) And in this case, the court apparently determined, for purposes of sealing the documents in connection with the litigation, that both McFetters' Gold Sheet and McShane's "yeah.xls spreadsheet" contained trade secrets of USBEF.

But even if we assume that determination is correct, and would be upheld as part of a final judgment,⁸ it does not imply any determination that either McFetters or McShane "misappropriated" the information. Significantly, CUTSA specifically prohibits only two types of misconduct: wrongful *acquisition* of a trade secret;⁹ and wrongful *use or disclosure* of a trade secret by one who possesses it.¹⁰ But it does not

⁸ And we make no such assumption. The propriety of the order sealing the documents is not before us, and for purposes of the anti-SLAPP motion which is before us, we need only concern ourselves with whether there is sufficient prima facie evidence to support such a conclusion. We believe there is, while acknowledging that defendants have submitted evidence which raises numerous issues of fact pertaining to the point.

⁹ Civil Code section 3426.1, subdivision (b)(1) provides that misappropriation includes "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means."

¹⁰ Civil Code section 3426.1, subdivision (b)(2) provides that misappropriation includes "[d]isclosure or use of a trade secret of another without express or implied consent by a person who: [¶] (A) Used improper means to acquire knowledge of the trade secret; or [¶] (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was: [¶] . . . [¶] (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or [¶] (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or [¶] (C) Before a material change of his or

prohibit the mere possession of a trade secret by someone who did not acquire it wrongfully.

“The [California] Uniform Trade Secrets Act requires an ‘[a]ctual or threatened misappropriation . . . ’ (§ 3426.2, subd. (a).) Mere possession of trade secrets by a departing employee is not enough” (*FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1279.)

In this case, USBEF provided no admissible evidence that either McFetters or McShane had wrongfully acquired any trade secret information, or that they wrongfully used it in any manner other than in their litigation filings. The declaration of Kyin Lok, USBEF’s senior vice president and the manager of its technology finance group’s business unit (which employed both McFetters and McShane), which is based largely on information and belief, contains no admissible evidence establishing how either defendant came into possession of alleged trade secret information,¹¹ or that either has actually used it to compete against USBEF. Lok does suggest that this information would be valuable to a competitor, and also claims that some of USBEF’s former customers have since become customers of CoreTech, but there is no evidence establishing any link between defendants’ possession of the disputed information and any decision by a customer to leave USBEF.

The mere fact that a former employee possesses trade secret information, and intends to compete with his former employer in circumstances where such information would prove useful is not sufficient to sustain a cause of action. Such a claim, based upon the so-called “doctrine of inevitable disclosure,” has long since been rejected in California as inconsistent with our public policy favoring employee mobility.

her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.”

¹¹ Similarly, the declaration of the forensic expert, which was submitted in support of USBEF’s request for a preliminary injunction, fails to include any actual evidence that either McFetters or McShane actually acquired any information through wrongful means.

(*FLIR Systems, Inc. v. Parrish*, *supra*, 174 Cal.App.4th at p. 1277; see also *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1149, quoting *Continental Car-Na-Var Corp. v. Moseley* (1944) 24 Cal.2d 104, 110 “[I]t has long been the public policy of our state that ‘[a] former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of . . . his former employer, provided such competition is fairly and legally conducted.’”].) Unfortunately for USBEF, that is all it has established in this case.

The second problem with the CUSTA claim, as the trial court pointed out, is that even if it were otherwise legally sufficient, it is unsupported by evidence that USBEF has been damaged by any alleged misappropriation. Specifically, there is no evidence that USBEF was damaged by defendants’ reliance on the trade secret documents in their commission litigation, and (as we have already pointed out) no evidence otherwise linking defendants’ possession of that information to any loss of business by USBEF.

Although as USBEF points out, CUTSA provides for other remedies in addition to damages (see Civ. Code, §§ 3426.2-3426.4; *Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 226 [“a successful trade secret plaintiff is entitled to the full panoply of remedies, including injunctive relief against further misappropriation ([Civ. Code,] § 3426.2), damages for actual loss ([Civ. Code,] § 3426.3), and relief from unjust enrichment (*ibid.*)” (fn. omitted)]), USBEF fails to cite any evidence demonstrating it would have been entitled to those alternate remedies either.

Specifically, USBEF offered no evidence that defendants earned any unjust riches from their alleged misappropriation, or that any “further misappropriation” is imminent. In the absence of such evidence, no injunction will be justified. “““A trade secret will not be protected by the extraordinary remedy of an injunction on mere suspicion or apprehension of injury. There must be a substantial threat of impending

injury before an injunction will issue. . . .” [Citations.]’ (*Del Monte Fresh Produce Co. v. Dole Food Co., Inc.* (S.D.Fla. 2001) 148 F.Supp.2d 1326, 1328 [discussing California and Florida law].)” (*FLIR Systems, Inc. v. Parrish, supra*, 174 Cal.App.4th at p. 1279.) Thus, mere “speculation that a departing employee may misappropriate and use a trade secret in a startup business will not support an injunction.” (*Id.* at p. 1277.)

Because USBEF offered insufficient evidence to demonstrate any unjust enrichment, or to support the issuance of injunctive relief in this case, the fact that such relief is theoretically available does nothing to save its cause of action under CUTSA.

Most of the causes of action which follow USBEF’s CUTSA cause of action, including its claims for breach of loyalty, breach of fiduciary duty, conversion, and intentional interference with prospective economic advantage, are preempted by the CUTSA law, as they arise out of the same allegations which support the CUTSA claim. As explained in *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc., supra*, 171 Cal.App.4th at p. 960, CUTSA preempts claims “based on the same nucleus of facts as the trade secret misappropriation claim.” (See also *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210.) Indeed, as provided for in Civil Code section 3426.7, CUTSA specifically preserves only those claims based upon (1) other statutes that “relat[e] to misappropriation of a trade secret” or “regulat[e] trade secrets”; and (2) existing “contractual remedies,” “criminal remedies,” as well as those civil remedies *that are “not based upon misappropriation of a trade secret.”* (Civ. Code, § 3426.7, subds. (a), (b), italics added.)

And to the extent that those additional claims include allegations of wrongdoing which are distinct from the misappropriation claims, such as the allegation that McShane “sabotaged” the trade show dinner, or that McFetters erased the hard drive on his work laptop before returning it to USBEF, they fail for lack of any prima facie evidence that these alleged wrongs caused damages to USBEF. In particular, Lok’s assertion that, as a result of McShane’s failure to line up clients for USBEF’s planned

dinner, it “lost opportunities at the conference to build relationships and generate business leads, and lost visibility with our customers, which ultimately resulted in a loss of sales,” is utterly conclusory, lacking in foundation, and speculative. It is consequently insufficient to support the claim.

As for the alleged computer crime, the court properly noted that even assuming USBEF would be entitled to recover expenses incurred in “verify[ing] that a computer system . . . was or was not altered, damaged, or deleted by the access,” it failed to offer any evidence establishing that it incurred any such expenses.

Although USBEF’s cause of action for breach of contract is not preempted by CUTSA, the claim still fails due to the insufficiency of any evidence that it would be entitled to relief as a result of the alleged breach. In support of this claim, USBEF alleged that both McFetters and McShane breached their employment contracts by failing to “return” all confidential customer information to it when they terminated their employment. Certainly, USBEF offered sufficient evidence to establish that (1) at least some of the customer information at issue in this case qualified as its confidential customer information; (2) both McFetters and McShane were obligated, as part of their employment agreements, to “return all” such information to it upon termination of their employment, including that held in “electronic devices and home computers”; and that (3) McFetters and McShane had not complied with that obligation. However, USBEF did not provide any evidence sufficient to establish that it had actually suffered any damages as a result of those breaches, or any evidence suggesting it would be entitled to injunctive relief.

Indeed, although USBEF did provide evidence McShane had signed an agreement in which he explicitly acknowledged that his failure to abide by his obligations to protect its confidential information will cause “irreparable injury” to the company, whatever injury was caused by his failure to “return” all information upon termination of his employment has already occurred – and granting injunctive relief at this point would

do nothing to address it. And while McShane's agreement further provides that he consents to the entry of an injunction to "restrain any breach" of the agreement, there is no evidence that McShane intends to commit any further breaches of the agreement.

With respect to McFetters, USBEF provided evidence that he signed an agreement which recites that "monetary damages alone would not be a sufficient remedy for a breach" of the agreement, and thus the company "shall be entitled to . . . all appropriate injunctive relief." But the provision does not, by its terms, provide for any injunctive relief beyond what is otherwise appropriate under law. And again, the only probable breach established by the evidence was McFetters' act of departing his employment without "returning" all of the confidential customer information in his possession. As with McShane, that past breach cannot be addressed by the imposition of injunctive relief, and there is no evidence that McFetters intends to commit any future breaches of the agreement.

"The power to issue an injunction is an extraordinary one to be exercised always with great caution and only in those cases where it appears that the plaintiff will suffer irreparable injury if it is not issued. The office of the writ is a preventive one and it is to be used to restrain a wrongdoer, 'not to punish him after the wrong has been done or to compel him to undo it.' An injunction lies only to prevent injury and has no application to wrongs which have been completed. (*Stewart v. Superior Court* [(1893)] 100 Cal. 543, 546-547; *Blake v. City of Eureka* [(1927)] 201 Cal. 643, 661; *City and County of San Francisco v. Market St. Ry. Co.* [(1950)] 95 Cal.App.2d 648, 656; *Blumenthal v. Di Giorgio Fruit Corp.* [(1938)] 30 Cal.App.2d 11, 18.)" (*People v. Paramount Citrus Assn.* (1957) 147 Cal.App.2d 399, 412-413.)

"A permanent injunction is an equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is

appropriate. A permanent injunction is not issued to maintain the status quo but is a final judgment on the merits.” (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.)

As explained in *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, an injunction may be appropriate in cases “where there is the fact of an injury, such as that arising from a breach of contract, but where there is an inability to ascertain the amount of damage” (*id.* at p. 722); or in cases where there is a threat of future harm, but it is shown that either “pecuniary compensation would not afford adequate relief[;] . . . it would be extremely difficult to ascertain the amount [of compensation which] would afford adequate relief”; (*ibid.*) or restraint is necessary to prevent a multiplicity of judicial proceedings. . . .” (*Ibid.*, quoting Civ. Code, § 3422.) None of those justifications was supported by USBEF in this case.

Because USBEF failed to provide sufficient evidence demonstrate either that it has been damaged by McFetters’ and McShane’s past breaches of the alleged confidentiality provisions of their employment agreements, or that it may be entitled to injunctive relief as a result of future harm stemming from such alleged breach, the court did not err in granting the motion to strike that cause of action.

V

The final cause of action, which the court did not strike, is the cause of action for violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Although defendants argue the claim is necessarily based upon the alleged violation of CUTSA, and thus necessarily fails for the same reason the CUSTA claim failed, we cannot agree.

There are two problems with defendants’ argument. First, the trial court ruled that the CUTSA claim failed on the ground that USBEF failed to provide sufficient evidence of damages, a problem which is irrelevant to a claim under the unfair competition law. In fact, such a claim is a purely equitable action, by means of which a

plaintiff may recover either money or property obtained from the plaintiff through unfair or unlawful business practices. Indeed, compensatory damages *are not available* in an action under the unfair competition law. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163.) Obviously, then, the lack of any evidence of damages would not be a hindrance to such a claim.

The second problem with defendants' argument is it ignores the fact that the unfair competition claim is allegedly based upon defendants' breaches of contract, as well as their violation of CUTSA. And as we have already explained, USBEF has provided sufficient evidence to establish a *prima facie* claim that the contracts were breached by McFetters and McShane when they failed to return all trade secret documents and information upon termination of their employment with USBEF.¹² Again, the problem with that claim in terms of the instant motion to strike is that no evidence of damages was established. And again, that would not be a problem for the claim based upon the unfair competition law.

The unfair competition law requires only that defendants have committed some "unlawful, unfair or fraudulent business act or practice," and it empowers the court to enter "such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Here, USBEF introduced evidence that McFetters and McShane acted unlawfully or unfairly when they retained the documents containing confidential customer information belonging to USBEF in violation of their agreements with it. Such unlawful or unfair conduct, which can be reasonably construed as a "business act" under the broad expanse of the unfair competition law,¹³ was sufficient to

¹² Again, we emphasize that we are implying no determination that such a claim would necessarily prevail.

¹³ "[T]he unfair competition law's scope is broad. . . . [I]t does not proscribe specific practices. Rather, [as relevant here,] it defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.'" (Bus. & Prof. Code, § 17200.) Its coverage is "sweeping, embracing 'anything that can properly be called a business practice and that at the same time is forbidden by law . . .'" (*Rubin v. Green* (1993) 4 Cal.4th

invoke its protections and would specifically empower the court to fashion an injunction requiring McFetters and McShane to “restore” (to the extent possible) that improperly retained customer information to USBEF. It would also empower the court to order restitution of any profits unjustly earned by McFetters or McShane as a result of their acts of unfair competition, although as we have already noted, USBEF has not, as yet, technically alleged that they have actually used the purportedly confidential information *to compete with it*,¹⁴ nor produced any evidence of such damages.

We differ with the trial court’s analysis of this cause of action only to the extent that it apparently viewed USBEF’s evidence as sufficient to the extend the unfair competition claim to CoreTech. In our view, there was no evidence to support the allegation that CoreTech itself was involved in any breach of McFetters’ or McShane’s employment agreements, and thus that it had engaged in those allegedly unlawful or unfair acts.¹⁵ And in the absence of any evidence that CoreTech engaged in other unlawful or unfair business acts (and we are aware of none), there was no basis to deny the motion to strike as to CoreTech. We therefore conclude the court erred in refusing to do so.

VI

1187, 1200, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113.) By proscribing ‘any unlawful’ business practice, ‘section 17200 “borrows” violations of other laws and treats them as unlawful practices’ that the unfair competition law makes independently actionable. . . . [¶] . . . [¶] However, the law does more than just borrow. The statutory language referring to ‘any unlawful, unfair *or* fraudulent’ practice (*italics added*) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

¹⁴ What USBEF has alleged is that McFetters and McShane (1) are currently competing with USBEF through CoreTech; (2) have misappropriated confidential or trade secret information “to use” in that competing business; (3) the information is the type which would give any competitor an “unfair advantage” and a competitor “would benefit” from it; and (4) each of them has “used” and “disclosed” the information “in connection with” their own business activities – specifically to support their commission litigation against it. Absent is any allegation specifically asserting that any defendant actually used USBEF’s trade secret information *to compete with it*; that CoreTech secured any clients through the use of such information, or that USBEF lost any as a result of such use.

¹⁵ CoreTech is alleged to have “conspired” with the other defendants in committing their wrongful acts, but a defendant cannot be held liable for conspiracy to breach a duty which it does not owe. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511; *Doctors’ Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.) Moreover, USBEF introduced no evidence to support the conspiracy allegation against CoreTech.

USBEP's final contention is that the court erred in granting defendants' motion for attorney fees and costs as prevailing parties on the anti-SLAPP motion.

USBEP first complains that defendants failed to sustain their burden of proving the fees they sought were reasonable and specifically related to the anti-SLAPP motion, because their fee request was supported only by declarations from each of the three attorneys who worked on the anti-SLAPP motion. According to USBEP's characterization, each of these declarations offered only a vague and conclusory description of the work done, and simply reciting the number of hours the attorney spent and his or her billing rate. USBEP asserts that such a showing, unaccompanied by copies of billing records, provides the court with an insufficient basis to assess the reasonableness of the amount requested, or to determine whether the requested fees were actually incurred in connection with the anti-SLAPP motion rather than some other aspect of the case.

We are unpersuaded. In support of its argument, USBEP relies heavily on *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, a case in which the court chided the proponent of a fee request for failing to support a significant portion of the request with any evidence. Although USBEP suggests *Ajaxo* stands for the proposition that the proponent of the fee request “*must present* ‘billing records’ or other ‘records sufficient to provide a proper basis for determining how much time was spent on particular claims,’” the case says no such thing. Instead, the problem in *Ajaxo* was that the proponent of the fee request was seeking nearly \$175,000 in fees allegedly incurred by its *prior counsel*, supported only by a declaration from the client's principal, who purported to attest to the number of hours spent by the prior counsel, as well as the hourly rate charged. The principal's declaration was unsupported by copies of the prior counsel's billing records, and there was no direct declaration from the prior counsel attesting to anything. Consequently, there was no evidence at all upon which the court

could base a determination that either the hours or the billing rate claimed was accurate or reasonable.

The evidence here is quite different. Each of the attorneys who spent time on defendants' anti-SLAPP motion submitted a declaration under penalty of perjury, and each noted his or her lengthy professional experience in the area of employment law (ranging from 26 years to 36 years), specified the number of hours spent on the motion, his or her usual billing rate (\$300 - \$375 per hour), and the rate being charged for this case (\$300 per hour.)

In support of defendant's contention that the hourly rate requested was reasonable, one of the attorneys offered evidence demonstrating that counsel for USBEF charges \$475 per hour for the services of an associate attorney with less than five years experience. Additionally, the declarations included additional testimony explaining why it was necessary to devote a significant amount of time to the anti-SLAPP motion, noting that USBEF's inclusion of 10 separate causes of action in its complaint required that significant amounts of research and analysis be conducted in connection with the anti-SLAPP motion.

In our view, this evidence was sufficient to provide the court with a reasonable basis to determine a proper fee award. While counsel's billing records are often useful, and may provide corroboration for counsel's description of the services and the purpose for which they were rendered, such records are not a required aspect of a fee request. Specifically, counsel's direct assertion, under penalty of perjury, that he or she devoted the time for which fees are sought in connection with the anti-SLAPP motion (rather than on some other aspect of the case) is sufficient to support the court's implied determination that is the case.

USBEF also argues the court was required to essentially apportion the fee request, and award only a reduced amount, since defendants were successful in striking only nine of the ten causes of action alleged. However, the authority cited by USBEF

does not require the court to engage in any apportionment, but instead merely explains that where the anti-SLAPP motion is only partially successful, the court should “consider the defendant’s relative success on the motion in achieving his or her objective, and reduce the amount if appropriate.” (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 345.) And in this case, defendants were almost entirely successful, having reduced USBEF’s far-ranging 10 cause of action complaint down to a single claim for unfair competition against the individual defendants only – a claim which entitles USBEF to recover no damages, but only to seek restitution of any trade secret property improperly taken by McFetters, along with any profits USBEF can prove they earned by means of their alleged act of unfair competition. This reflects a near total victory, and in the absence of some indication that the time spent attempting to defeat the unfair competition claim against McFetters and McShane specifically was segregable or distinctly identifiable, we cannot say the court erred in failing to discount the fee request to account for it.

The trial court has significant discretion to determine the proper amount of fees to award in connection with an anti-SLAPP motion, and we will not disturb that exercise of discretion absent a showing of abuse. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1322; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132, [trial court’s fee award “will not be disturbed unless the appellate court is convinced that it is clearly wrong.”].) We conclude no such showing was made in this case.

USBEF’s final contention is that the court erred in allowing defendants to recover costs for Lexis/Nexis charges (\$124.69), Federal Express charges (\$70.52), and photocopying (\$108.36) in connection with the anti-SLAPP motion. It asserts that such expenses are not recoverable costs under section 1033.5, and thus should not have been awarded. We assume the amount USBEF has expended to present this issue on appeal exceeds the relatively paltry amount at issue (\$300) and commend defendants’ counsel for not bothering to respond to the point in its brief

In the context of this case, we conclude this issue falls within the doctrine of “de minimus non curate lex” and we decline to address it on appeal. (See *Eagle Oil & Refining Co. v. Prentice* (1942) 55 Cal.App.2d 161 [applying the doctrine to \$1.50 in notary fees in 1942] and *Connell v. Harron et al.* (1908) 7 Cal.App. 745 [applying the doctrine to a claim in the sum of \$7.85 in freight charges in 1908]; see also Civ. Code, § 3533 [“The law disregards trifles.”].)

DISPOSITION

The order ruling on the anti-SLAPP motion is reversed and remanded with directions to strike the cause of action for violation of the Unfair Competition Law against CoreTech and otherwise affirmed in all other respects.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O’LEARY, J.

MOORE, J.